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No. 82-700

In the Supreme Court of the United States

October Term, 1982

JEWEL BURRUS,
Petitioner,

vs.

UNITED TELEPHONE COMPANY
OF KANSAS, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ARLYN D. HAXTON, Counsel of Record
JOHN A. VERING III
JENNIFER A. PUTMAN
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420

J. RICHARD SMITH
6666 West 110th Street
Overland Park, Kansas 66211
Counsel for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-9030

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Respondent, United Telephone Company of Kansas, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circut's opinion in this case. That opinion is reported at 683 F.2d 339.

STATEMENT OF THE CASE

Respondent does not feel that a full restatement of the case is necessary, however, that portion of petitioner's statement on pages 6 and 7 of her petition pertaining to the subject of her statistical evidence departs from a fair recital of relevant facts and is comprised chiefly of argumentative statements, allegations of legal conclusions attributed to her expert witness regarding the probative value of his testimony and substantial editorializing of the record in this matter. The petitioner fails in her statement to mention that the record in this matter contains evidence of a number of inaccuracies in the data base upon which her expert witness grounded his conclusions including incomplete data for each of the years of employment regarding the 55 employees who were the subject of the statistical sample, inclusion of female clerical employees in lower pay grades than petitioner and consideration of a number of employees twice because of confusion of their married and maiden names. Based upon the evidence of such inaccuracies in the data base, together with evidence that the samples were smaller than the universe from which conclusions were attempted to be drawn, the trial court found that the statistical evidence of petitioner lacked probative value. The court of appeals held such finding to be supported by the record.

Respondent feels constrained also to comment upon what it perceives to be an implication in petitioner's recitations of her statement that, whatever inaccuracies there may have been in her statistical data base were due to information provided to petitioner by respondent in the course of discovery. While, of course, it is true that respondent provided certain business records to petitioner from which petitioner compiled certain statistics, the in-

accuracies arose during the compilation from such records—not from the information and records themselves. The record in this matter is bereft of any indication whatsoever that respondent supplied inaccurate records or information to petitioner or even that petitioner claimed as much during the trial.

REASONS FOR DENYING THE WRIT

1. Certiorari should be denied because there is no conflict in principle among the courts of appeal and no important questions of federal law which should be settled by this court.

No conflict in the decisions or in principle exists among the courts of appeal on the proper use of subjective criteria in employment decisions.

The cases that Petitioner relies upon in support of her contention that the Court of Appeals for the Tenth Circuit erroneously held that subjective criteria may be used to explain why she was rejected for promotions actually either support the decision in the lower court or are readily distinguishable from the instant case. For instance, in *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir. 1974), *cert. denied*, 419 U.S. 1033, the court found, as did the court below, that the denial of a promotion to an otherwise qualified individual for subjective reasons was a prima facie violation of Title VII requiring the employer to articulate a "legitimate, nondiscriminatory reason" for not promoting the plaintiff. *Id.* at 442. *Both* the court below and the court in *Baxter* found that subjective criteria are permissible "legitimate, non-discriminatory reasons." *Id.* at 446.

In *Baxter*, the court held that an individual discriminatee could not recover for the company's failure to promote him because there was evidence that he had a "bad attitude" and lacked the proper mechanical background. *Id.* at 446, note 3. Similarly, here the lower court held that Ms. Burrus could not recover against respondent because the trial court properly found that "[s]he lacked the required ability to get along with others [which] was a legitimate business reason amply supported by the evidence and not rebutted by any showing of pretext." 683 F.2d at 342. (Pet. p. A7).

These two decisions present no conflict with *Crawford v. Western Electric Co.*, 614 F.2d 1300 (5th Cir. 1980), where the court remanded the case to the trial court (after finding a prima facie case had been established) in order for it to make findings on testimony by supervisors regarding each "plaintiff's work habits, aptitudes, and *attitudes* that, if credible, might serve to rebut plaintiffs' cases by proving legitimate, non-discriminatory reasons for their slow advancement." *Id.* at 1320. (Emphasis supplied).

The court below upheld the trial court's finding of fact that the subjective evaluation that Burrus lacked the required ability to get along with others was a legitimate business reason for not promoting her. 683 F.2d at 342. (Pet. p. A7). Thus, the courts in *Crawford*, *Baxter* and below each have recognized that subjective evaluations such as poor attitude and inability to communicate with others can be "legitimate, non-discriminatory business reasons" for refusing to promote an employee.

Further, in the other case that petitioner cites in support of her argument that the circuits are in conflict, the court was not even presented with the question of whether any particular employee was not promoted because he was not qualified. In *Robinson v. Union Carbide*

Corp., 538 F.2d 652 (5th Cir. 1976), *modified on other grounds*, 544 F.2d 1258, *cert. denied*, 434 U.S. 522 (1978), the court was faced with the issue of whether certain promotional practices were discriminatory in the context of a class action. Thus, the court did not reach the second step of the "three-step" Title VII sequence of proof as established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) and utilized by the court below in determining that petitioner's prima facie case was overcome by respondent's legitimate, non-discriminatory reason for failing to promote her.

Petitioner's argument that the lower courts' failure to find that she was discharged in retaliation for the filing of a claim with the Kansas Civil Rights Commission and the EEOC is in "conflict with cases from other circuits" is wholly devoid of merit and rests upon the novel theory that courts in different circuits are required to come to the same conclusion upon different fact situations and the testimony of different witnesses.

For example, in *Sherkow v. Wisconsin Department of Public Instruction*, 630 F.2d 498 (7th Cir. 1980), a case that the petitioner argues is in conflict with the court below, there was a trial court finding of unlawful retaliation. In the instant case, there was no such finding by the district court. Also, in *Sherkow*, there was testimony by the chairman of the interview panel that he had "negative reactions to her public statements on the subject of discrimination and that this affected his assessment of her qualifications for the job." *Id.* at 502.

Similarly, in *EEOC v. Pacific Press Publishing Association*, 482 F.Supp. 1291 (N.D. Cal. 1979) the court found that the termination in question was retaliatory and that "Press has failed to come forward with a legiti-

mate, non-discriminatory explanation for its conduct." *Id.* at 1316. Here, both lower courts found that respondent had come forward with a legitimate, non-discriminatory explanation for its conduct. *See also Mead v. United States Fidelity and Guaranty Company*, 442 F.Supp. 114 (D. Minn. 1977) (evidence did not sustain assertion that plaintiff did not get along with her fellow employees).

Petitioner further complains that the "lower courts ruled in conflict with other circuits" by ruling that the number of persons involved constituted too small a data base for certain statistical evidence to be probative. However, the size of the statistical base was just one of several factors upon which the trial court based the finding that the statistics lacked probative value. These factors included "inclusion of certain persons who were not members," "multiple inclusion of some individuals (under different names)" and failure to make comparison between the "employee group in question to the other employee groups existing in defendant's organization." (Pet. p. A18).

Even if the size of the statistical base had been the sole factor relied upon by the courts below, petitioner fails to show any conflict among the circuits on the issue. The case of *Davis v. Califano*, 613 F.2d 957 (D.C. Cir. 1979) cited by petitioner, is totally inapposite here. In *Davis*, the court found that statistical evidence may establish a prima facie case of employment discrimination in an individual case as well as in a class action case. That court did not hold that *all* statistical evidence, no matter how inaccurate or flawed, established a prima facie

In *Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895 (5th Cir. 1978), the court actually held that the fact that there were only five positions open did not preclude a finding that an employment condition resulted in a statis-

tically disparate impact because the "proper focus when determining the disparate impact of an employment condition is on those excluded by the requirement, not on the number of positions to be filled. . . ." *Id.* at 899.

As *Payne* was a "disparate impact" case and this case is not and because *Payne* did not hold that a statistical sample of five was sufficiently probative, it has no bearing upon the facts in the instant case.

Because the lower courts in the case at bar found serious factual errors in the survey which affected its accuracy, the isolated issue of whether a 55 person sampling is probative or not does not present itself.

2. The Tenth Circuit Court of Appeals has followed the applicable decisions of this Court in deciding the issues in this case.

Petitioner complains that the Tenth Circuit Court of Appeals has decided this case in conflict with this Court's decisions in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). Petitioner's argument rests on an erroneous interpretation of the lower court's holding.

First, petitioner contends that the court of appeals "improperly concluded, however, that Respondent has not used subjective analysis in its exclusion of Petitioner from promotions she sought." (Pet. p. 14).

The lower court made no such conclusion. Actually, the court of appeals upheld, 683 F.2d at 342 (Pet. p. A7), the trial court's finding that:

> "[E]ven assuming the existence of a prima facie case based on Burrus' objective qualifications, the sub-

> jective evaluation that she lacked the required ability to get along with others was a legitimate business reason amply supported by the evidence and not rebutted by any showing of pretext."

Next, petitioner contends that "Respondent must produce evidence that would dispel the inference of retaliation for the employment action taken." (Pet. p. 14).

Assuming *arguendo* that petitioner is correct on this legal point, in this case there was *no* prima facie showing made to raise an inference of retaliation. Also the court upheld the finding that, even *assuming* a prima facie case had been made:

> "UTC offered legitimate reasons for Burrus' restricted opportunities which she didn't demonstrate were a mere pretext for discrimination . . . . Without detailing all the evidence, we note testimony regarding Burrus' continuing attitudinal problems and her inability to work with fellow employees." *Id.* at 343-4. (Pet. p. A9).

The above remarks of the court clearly indicate that it did *not* focus solely on the discharge of petitioner as she contends but, rather, considered matters continuing throughout her employment.

Finally, petitioner's reliance upon this Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) is greatly misplaced. Although correct in her assertion that the Court pointed out the importance of statistical evidence, she is incorrect in her conclusion that the decision stands for the proposition that erroneous and flawed evidence deserves to be accorded probative value by any court. In fact, the Court cautioned in that decision, at 340, that the usefulness of statistics "depends on all of the surrounding facts and circum-

stances" and that "Considerations such as small sample size may, of course, detract from the value of such evidence." *Id.* at 340, n.20.

CONCLUSION

Respondent respectfully submits that petitioner has failed to demonstrate any grounds for granting a writ of certiorari in this matter. She has not shown a real conflict among the circuits on the same matter of law or fact. The alleged conflict with the decisions of this Court does not exist. Rather, it is clear that she seeks review of a decision of the Tenth Circuit which turns solely upon the analysis of the particular facts involved. She asks this Court to review the evidence and the concurrent findings of fact by the two lower courts in absence of any showing of error. The court of appeals below has correctly assessed the record and has found that the findings of fact by the trial court are supported by substantial evidence. There is no need for additional review by this Court.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARLYN D. HAXTON, Counsel of Record
JOHN A. VERING III
JENNIFER A. PUTMAN
1700 City Center Square
1100 Main Street
Kansas City, Missouri 64105
(816) 221-3420

J. RICHARD SMITH
6666 West 110th Street
Overland Park, Kansas 66211
Counsel for Respondent